ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF OHIO.[2]

SUPREME COURT OF VERMONT.[3]

SUPREME COURT OF WISCONSIN.[4]

ACTION.

Threatening Letters—Pleading.—Threats of bodily hurt which occasion such interruption or inconvenience as to produce pecuniary damage, are actionable. A mere vain fear is not sufficient; it must be founded upon an adequate threat. A count which only alleges that the defendant threatened the plaintiff *with great injury*, without any allegation of accompanying circumstances known to the defendant, which would render the plaintiff less able to withstand such threat than persons of ordinary firmness, is not sufficient: *Grimes* v. *Gates et ux.*, 46 Vt.

A count which alleges that the defendant, intending to frighten, terrify and injure the plaintiff, threatened to imprison the plaintiff, or to cause the plaintiff to be imprisoned, and that by means thereof the plaintiff was frightened, terrified and made sick, and rendered unable to attend to her usual business, and perform her usual work, and was thereby put to great expense, and made to suffer loss, is sufficient: *Id.*

In case for threats made by letter, it is not necessary to set out the words in which the threats were made, but only the substance of the threat: *Id.*

ADMIRALTY.

Collision.—A steamer condemned for a collision with a sailing-vessel, the wheelsman, mate, captain and other witnesses on the sailing-vessel swearing positively to courses and distances and times immediately prior to the collision, and these showing that the steamer was in fault; while though there was strong evidence on the steamer's side to show that these courses, distances, and times could not have been truly stated by the witnesses in behalf of the sailing-vessel, this evidence was inferential chiefly; consisting of conclusions or arguments drawn from other facts sworn to, as *ex. gr.*, the lights which the steamer saw and the lights which she did not see on the sailing-vessel; and the effect of giving credence to this inferential or argumentative testimony being to convict as of necessity the witnesses for the sailing-vessel of perjury: *The Wenona*, 19 Wall.

Collision—Total Loss.—A steamer running at the rate of from eight to ten knots an hour, on a bright moonlight night, in an open bay, with nothing to mislead her, condemned for the loss of a schooner sailing with a six-knot breeze, whose only fault was alleged to be a false ma-

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[1] From J. W. Wallace, Esq., Reporter; to appear in vol. 19 of his Reports.

[2] From Hon. M. M. Granger, Reporter; to appear in 24 Ohio State Reports.

[3] From J. W. Powell, Esq., Reporter; to appear in 46 Vermont Reports.

[4] From Hon. O. M. Conover, Reporter; to appear in 34 Wisconsin Reports.

nœuvre in the moment of impending collision. The court declares it to have been the "duty of the steamer to see the schooner as soon as she could be seen, to watch her progress and direction, to take into account all the circumstances of the situation, and so to govern herself as to guard against peril to either vessel:" *The Falcon*, 19 Wall.

Where the libel alleged that the loss by the collision was substantially a total loss, and the answer substantially admitted this—the vessel having sunk in Chesapeake Bay in five fathoms water, and it being clear from the proofs that she could not have been repaired without a large expenditure of time and money—*held*, that the fact that she was finally raised, repaired, and put in good condition, was no defence to a claim for a total loss;—especially as it did not appear at whose instance or at what cost this was done; nor by what right those in possession of her held her; and it not being either alleged or proved that she had been tendered back to her original owners. The case distinguished from *The Baltimore* (8 Wallace 378): *Id.*

But this decree for a total loss declared to bar any claim to the schooner by her former owners, and that their title should be remitted to the owners of the steamer: *Id.*

Collision—Mutual Fault—Disregard of Nautical Rules.—A collision occurred in a very dense fog between a sailing-bark and a large steamer, about two hundred miles from Sandy Hook, and therefore in the track of inward and outward bound vessels. The bark was under way moving slowly, and at about the rate of a mile an hour, and was *ringing a bell* as a fog signal. The steamer was going at the rate of seven knots an hour:

Held, That the damages were to be equally divided between the two vessels, as, being both in fault, the steamer in moving in such a place at so rapid a rate in so dense a fog, the bark for her violation of the Act of Congress for preventing collisions at sea (identical in this respect with the British Merchants' Shipping Act), which requires, in its "Rules concerning Fog Signals," that "sailing-vessels under way shall use a *foghorn*," and "when not under way shall use a *bell*:" *The Pennsylvania*, 19 Wall.

Although, if it clearly appears that a fault committed by a vessel has had nothing to do with a disaster which has occurred, the liability for damages is against the vessel alone which has produced the disaster, still where a vessel has committed a positive breach of statute she must show not only that probably her fault did not contribute to the disaster, but that certainly it did not; that it could not have done so. In this case, therefore, Congress having made the use of a foghorn obligatory on sailing-vessels under way in a fog, it was declared to be out of place to go into an inquiry whether, in fact, a bell gave notice to the steamer that the bark was where she was as soon as a foghorn would have done: *Id.*

AGENT. See *Insurance.*

AMENDMENT.

Cannot change Cause of Action or Nature of Defence.—It is the settled rule in this state, that a party cannot, by *amendment of his pleading before trial*, change the whole nature of his cause of action or ground of defence; and in particular, that plaintiff cannot under the form of an amend-

ment of his complaint before trial, change the action from one in *tort* to one on *contract*, or the reverse: *Supervisors of Kewaunee Co.* v. *Decker*, 34 Wis.

An order refusing to strike an amended complaint from the files is *appealable;* and in this case, the amendment being of the character above stated, such an order is reversed: *Id.*

Auction.

Positive Sale—Fraud.—Where a "sale" at auction is announced to be "positive," it is an act of fraud on the part of the vendor, or his agent, to employ by-bidders to keep up the price for his own benefit: *Walsh* v. *Barton*, 24 Ohio St.

Bills and Notes.

Defence of Want of Consideration.—The defence that a note sued on was *without consideration*, or that the maker, when he gave it, was under a mistake as to the fact or amount of an indebtedness supposed to be due from him to the payee (for which it was given), ought to be sustained by evidence which leaves no reasonable doubt: *Punch* v. *Williams*, 34 Wis.

Costs.

Objection to Taxation of—Allowance of Lump Sum by the Court as a Condition for a Continuance.—Objections to the taxation of costs at the Circuit must in all cases be first taken before the taxing officer, or they cannot be heard here: *Hawkins and Others* v. *The Northwestern Union Railway Co.*, 34 Wis.

On granting defendant a *continuance* (for the absence of witnesses), it was within the sound discretion of the Circuit Court to require, as a *condition* thereof, payment of a *gross sum* as costs and disbursements incident to the preparation of the cause for trial at the pending term, such sum not being exorbitant or unreasonable; and on appeal from such order defendant cannot object to specific items allowed and taxed by the clerk for attendance and mileage of witnesses, on the ground that the plaintiffs' affidavits in relations thereto were defective: *Id.*

Covenant.

Running with the Land—Fence.—Where it is stipulated in a deed-poll that the grantee, his heirs and assigns, shall build and perpetually maintain a fence on the line between the land granted and other lands owned by the grantor, and the parties to such deed, at the time of its execution, contemplate the subdivision of the granted premises into building or town lots, and their subsequent sale, the burden of maintaining such fence will not attach to, or run with, lots which do not abut on the line of the proposed fence: *Welsh* v. *Barton*, 24 Ohio St.

Debtor and Creditor.

Payment of Antecedent Debt by Promissory Note—Collateral Security.—The plaintiff and H. signed a note with K. as his sureties, at which time K. gave the plaintiff a note against the defendant, payable to K. or bearer, as indemnity. Said last-mentioned note was accommodation paper as between K. and the defendant; but the plaintiff had no know-

ledge of it. K. subsequently became insolvent, and all his property was divided *pro rata* among his creditors, making a dividend of thirty-five per cent. The plaintiff and H. received their dividend, and thereupon assumed and equally paid the note on which they were sureties; whereupon K. executed his note to the plaintiff, on six months, for the amount the plaintiff had paid as such surety, less said dividend: *Held*, that the plaintiff's claim upon the note was not discharged, and that the defendant was liable to him upon it: *Pinney* v. *Kingston*, 46 Vt.

DOMESTIC ANIMALS. See *Fences*.

EJECTMENT.

Plaintiff's Title at Time of Issue of Writ—Subsequent Acquisition of Title by Defendant—United States Land Office Certificate—Former Adjudication.—Under our practice, plaintiff in *ejectment* is only required to show that the title and right of possession was in him *at the commencement of the action*. A general denial, therefore, puts in issue, and the judgment determines, the title and right of possession only with reference to that time: *McLane* v. *Bovey*, 34 Wis.

Under a *general denial in ejectment*, defendant cannot introduce evidence of facts which have occurred since the commencement of the action, by virtue of which plaintiff has lost and defendant has acquired title to the land: *Id.*

In such a case the court may, at its discretion, grant leave to defendant, on his application therefor, to set up such facts by supplemental complaint. Tay. Stats. 1447, § 45: *Id.*

If leave for that purpose is not asked or granted, the *judgment* for plaintiff does not *bar a subsequent action* by the defendant to assert the title so acquired by him after the commencement of the former action: *Id.*

The person named in a certificate of entry of land at a U. S. land office, or his assignee or grantee, has "a valid subsisting interest" in the land, to which the right of possession is incident, and *may maintain ejectment* therefor: *Id.*

But the estate thus created is at most a *determinable fee*, liable, under the laws of the United States, to be terminated by the act of the commissioner of the general land office cancelling the certificate for cause at any time before the issue of a patent: *Id.*

Where a certificate is thus cancelled, the title revests in the United States, which may allow the land to be entered by, and a patent to be issued to, another person: *Id.*

X., the grantee of M., who had entered land and obtained a certificate of such entry, brought ejectment for the land against Y., who answered only by a general denial. During the pendency of the action, the commissioner of the general land office, for cause, cancelled the certificate of entry issued to M., and Y. was permitted by Act of Congress to purchase and enter the land, and did so, and received a certificate of such entry. On trial of the action of ejectment under the original pleadings, the court refused to receive Y.'s certificate in evidence, and X. had a verdict and judgment that he was seised of an estate in fee, of the land and had the right of possession. Afterwards the land was patented to Y. and he brought ejectment against X. therefor. *Held*, that the *actior was not barred* by the former judgment: *Id.*

ELECTION. See *Will.*

EQUITY. See *Will.*

ESTOPPEL. See *Frauds, Statute of.*

EVIDENCE. See *Railroad.*

Traditionary Evidence of Boundary.—One of the conditions upon which the declarations of deceased persons in relation to the location of boundary lines and monuments are received in evidence, is, that it shall be shown that they had knowledge of such lines and monuments at the time of making the declarations to be proved. But such knowledge cannot be shown by what they said: it must be proved by other means: *Hadley* v. *Howe*, 46 Vt.

Copies of U. S. Department Records.—Congress may prescribe the manner in which *copies of the records* of any department of the federal government may be *authenticated: McLane v. Boree and another*, 34 Wis.

A certificate of the commissioner of the general land office, signed by him and sealed with his official seal, attached to what purported to be copies of certain records of said office, and stating that "the annexed copies are true and literal exemplifications from the records and files of this office," *held* to be sufficient to render such copies *admissible in evidence* in the courts of this state. Laws of U. S. 1812, ch. 68 (2 U. S. Stats. at Large, p. 716): *Id.*

Receipt—Parol Evidence to explain—Revenue Collector's Receipt.—A receipt which does not constitute or import a contract, does not preclude parol evidence of the purpose for which it was given; and parol evidence is admissible to prove a contract made at the time of the execution of such receipt, and a part of the same transaction: *Randall* v. *Kelsey*, 46 Vt.

The plaintiff introduced in evidence a paper, to show the assessment of an internal revenue tax by an assistant assessor. *Held*, the paper not being produced in the Supreme Court, that it could not be assumed that it was not a proper instrument of evidence to show the assessment: *Id.*

An internal revenue collector's receipt is proper evidence to show payment of the tax receipted: *Id.*

FENCES.. See *Covenant.*

Railroad—Animals at Large—Negligence of Owners.—Enclosures of railroads, as required by the Act of March 25th 1859 (S. & C. 331), must be separate and distinct from the enclosures of adjoining proprietors: *Marietta and Cincinnati Railroad Co.* v. *Stephenson*, 24 Ohio St.

The obligation to construct and maintain fences upon both sides of railroads, imposed by that act upon railroad companies, is not limited to owners and occupiers of adjoining lands, but extends to the public generally: *Id.*

The rule of the English common law, which requires the owners of domestic animals to restrain them from running at large, has never been adopted or recognised as the common law of Ohio: *Id.*

The owner of such animals running at large is not guilty of a breach of any duty imposed upon him by the Act of April 13th 1865 (S. & S. 7), if they be at large without the omission on his part of reasonable care: *Id.*

Where cattle running at large, without the fault of the owner, enter the enclosed field of another person, through which a railroad passes, and thence go upon the track of the road by reason of the want of fences which it was the duty of the railroad company to have constructed so as to separate the railroad from the adjacent lands, such owner is not guilty, under the Act of April 7th 1865 (S. & S. 373), of contributing, by his own wrong, to an injury done by a passing train to his cattle while upon the railroad: *Id.*

Partition Fence—Action for half expense of—In an action brought under the Act of May 3d 1859 (S. & C. 81, 648), to recover one-half the value of a partition fence, the appraisal of the township trustees duly made, in pursuance of the provisions of the act, is, unless impeached for mistake or fraud, conclusive with respect to value, and of the fact that the fence, in character and quality, meets the requirements of the statute; but such appraisal is not evidence of any other fact: *Robb* v. *Brachmann*, 24 Ohio St.

The plaintiff in such action is not precluded from recovering, by the fact that the fence is a better or more expensive one that would have satisfied the requirements of the statute: *Id.*

Nor does the fact that the fence does not conform to the boundary line between the lands of the respective parties necessarily constitute a defence to such action. It is sufficient upon this point if it was constructed and maintained as and for such line fence, and was recognised and acquiesced in as such by the defendant: *Id.*

FORMER ADJUDICATION. See *Ejectment.*

FRAUDS, STATUTE OF. See *Vendor and Purchaser.*

Evidence.—Contracts within the Statute of Frauds are not illegal unless put in writing, but only not capable of being enforced against the defendant without writing; an immunity which the defendant may waive. Hence, when parol evidence of such a contract was given by the plaintiff, without objection by the defendant at the time it was offered, and not until the testimony was closed and the arguments to the jury had commenced, it was *held*, that the defendant had waived his right to object to the testimony: *Montgomery* v. *Edwards*, 46 Vt.

Promise not within—Estoppel.—The plaintiff, as administrator of an estate, delivered all the assets of the estate in his hands to the defendant, in consideration of the defendant's parol promise to pay all claims that might thereafter arise against the plaintiff as such administrator. *Held*, that the defendant's promise was not within the Statute of Frauds: *Randall* v. *Kelsey*, 46 Vt.

He afterwards made claim against the plaintiff as such administrator; and the testimony showed that it was at least questionable whether the plaintiff was not bound to pay it. The defendant, being notified of said claim, promised the plaintiff to take care of it, if sued, and was afterwards notified of the suit that was brought against the plaintiff upon

it, but neglected to attend to it, and judgment was rendered therein against the plaintiff, which he was compelled to pay. The testimony also tended to show that said claim was one the estate ought to pay, and that the defendant once recognised it, by promising to pay part of it to H. *Held*, in a suit by the plaintiff to recover the amount paid by him on said judgment, that the defendant was precluded from objecting that said claim was not against the plaintiff as such administrator: *Id.*

HUSBAND AND WIFE. See *Will.*

INSURANCE.

Waiver of Proof of Loss—Unintentional Error in Proof—Responsibility of Insurer for Acts done by his Agent in Name of Insured.—Where the insurer, after a loss and before the time for furnishing proofs thereof has expired, denies all liability entirely *upon other grounds* than the want of such proofs (such as, that a subsequent policy had been taken without the consent of such insurer, and that there was an over insurance and the loss was fully covered by prior policies), this is a *waiver* of the condition requiring proofs of loss to be made: *McBride* v. *Ins. Co.* (30 Wis. 562), and other cases in this court: *Smith* v. *Amazon Ins. Co.*, 34 Wis.

A question in the form of *application for a policy* related to the ownership of the property; and that part of the application was *filled in by the local agent* of the insurer, on his own knowledge, and without consultation with the assured. *Held*, that a mistake in naming the owners was the *mistake of the insurer*, and cannot defeat the policy, although the application is therein referred to as a part of the contract, and a warranty by the assured: *Id.*

The policy referred to an application No. 9719, and there was no application so numbered, but one was offered in evidence by the insurer numbered 9716, purporting to be made by plaintiff, for insurance on the property described in the policy, and in this the agent had made the erroneous entry above described as to the names of the owners of said property. The agent was asked by defendant on the trial whether the policy was issued on *this* application, for the purpose of showing a *false representation* in regard to the ownership. *Held*, that the testimony was properly rejected: *Id.*

An *unintentional mistake* in the proofs of loss will not prevent a recovery upon the policy. So *held* where the proofs were made out by the insurer, and stated incorrectly the names of the owners of the property, and there was evidence that one of the firm insured signed the same in haste, without knowledge of the error: *Id.*

JUDGMENT.

Clerical Error—Power of Court to Correct.—In a common-law action to recover *damages for the flowage* of plaintiff's land by a dam across a navigable stream, and also to *have the dam abated*, the court held (as shown by its minutes) that after a specified date the dam was a lawful structure (under an act of the legislature), and that plaintiff could recover in this action only for damages prior to that date, and must sue under the mill-dam law for subsequent damages. The clerk, after the term, entered judgment not only for the damages assessed by the jury,

but also for the abatement of the dam. At the next term the court vacated the latter portion of the judgment. *Held*,

1. That the judgment must properly be considered as entered during the term at which the cause was tried:

2. That at a subsequent term the court could not *review the judgment* on the merits, or correct its own errors; but it might *correct the judgment* so as to make the same conform to its previous decision:

3. That the ruling of the court, shown by the minutes, was equivalent to a *certificate*, not only "that the removal of the dam was unnecessary" (R. S. ch. 144, sec. 1), but that its abatement was unlawful; and there was no error in the order correcting the judgment: *Durning* v. *Burkhardt*, 34 Wis.

Municipal Bonds.

Act authorizing People of a Town to decide whether to subscribe its Bonds in aid of Railroad—Suits on such Bonds—Coupons.—There being nothing in the Constitution of the state of New York which makes unconstitutional an act of the legislature authorizing the people of a town to decide whether they will donate its bonds to a railroad company, and collect taxes for the amount, such an act (the same being enabling merely and not mandatory) is binding: *Town of Queensbury* v. *Culver*, 19 Wall.

Where a town, issuing bonds to which coupons or interest warrants are attached, acknowledges, in the body of the bond, that the town is indebted to the bearer or his assigns in such a sum of money, payable at a future day named, "with interest thereon at the rate of 7 per cent., on presentation and delivery of the coupons for the same thereto attached," it may be sued on the coupons alone, though they may have been issued by commissioners specially made agents of the town by the legislature, and by it charged with the matter of issuing the securities, and not made by the ordinary town authorities: *Id.*

This liability of the town is not taken away by the fact that the legislature has directed a special mode in which the money to pay the principal and interest of the bonds is to be raised; the directions being given to the town and county agents, and not to the holders of the bonds or coupons: *Id.*

An act empowered commissioners to dispose of certain town bonds (whose issue for the benefit of a railroad company named, the act authorized), "to such persons or corporation and upon such terms as the commissioners should deem most advantageous for the town, but not for less than par;" and to "donate the *money* which should be so raised to the railroad company." The act, however, required that they should not "pay over any money *or bonds*" except upon certain conditions specified. The commissioners did not sell the bonds, but handed them over to the railroad company in discharge of the authorized donation. On suit against the town by a *bonâ fide* holder of the bonds, *held*, that there was no violation of the act by the commissioners in what they had done: *Id.*

Municipal Corporation. See *Negligence*.

Change of Street Grade—Damages to Owners.—The charter of Milwaukee (ch. 10, sec. 18) declares that where the *grade of a street*, once

established, is afterwards *changed*, "all damages, costs and charges arising therefrom shall be paid by the city to the owner of any lot, or parcel of land, or tenement, which may be affected or injured" in consequence of such alteration. *Held*,

1. That the right to damages in such a case is *purely statutory:*

2. That the statute grants such damages only to the *owner* of the land or building injured, and only for *injuries to the land or building itself*, and costs or charges necessary to restore the same to their former relative condition and usefulness; and *not* for injury to or suspension of the *trade* carried on upon the premises:

3. That in an action under said charter for damages to *mill property* in consequence of a change in the established grade of a street, it was error to include in the judgment for damages a sum awarded by the jury "on account of the *loss of the use of the mill* during the raising and adapting of the same to the new grade:" *Stadler and another* v. *Wilwaukee*, 34 Wis.

NEGLIGENCE. See *Fences.*

Town—Pavements covered with Snow.—Under ch. 343, Laws of 1864 (Tay. Stats. 487, § 45), it is the duty of each *overseer of highways*, whenever any portion of the highways in his district is rendered *impassable by snow-drifts*, "to call out, upon one day's notice, the tax-payers of said district, and immediately put said part or parts of said highways in passable order:" *McCabe* v. *The Town of Hammond*, 34 Wis.

After a heavy fall of snow, accompanied by high wind, in any district, the overseer therein is *chargeable with notice* of the probable effects of such storm, and it is his duty to ascertain where the highways are obstructed by snow, and take steps to remove the drifts: *Id.*

In an *action for injuries* received by plaintiff in consequence of the highway being *obstructed by a snow-drift*, it appeared that the drift formed on Tuesday, that the wind continued to drift the snow on Wednesday, that it snowed again Thursday morning, though the wind had fallen, and that the accident occurred on Friday forenoon. *Held*, that the town was not *chargeable with negligence*, nor liable in the action, unless, in the exercise of *reasonable care* and diligence by the overseer in giving notice to tax-payers, the drift could have been removed before plaintiff was injured; and this was a *question for the jury* to determine from all the circumstances: *Id.*

It was error, therefore, to instruct the jury that the town would not "be relieved from its liability by showing *ordinary care:*" *Id.*

OFFICER.

Usurpation—Criminal Intent.—An officer legally appointed and qualified, continuing to act as such officer after the expiration of his term, in good faith, reasonably believing it to be his duty to discharge the duties of the office until his successor is qualified, is not to be regarded as criminally usurping the office, within the meaning of section 13 of the Act of March 8th 1831, "for the punishment of certain offences therein named." *Kreidler* v. *The State*, 24 Ohio St.

PLEADING. See *Action; Trespass.*

RAILROAD. See *Fences.*

Deed by President—Purchase of Land by—Ultra Vires.—A deed, purporting to have been executed by the president of a railroad corporation, under the seal of the corporation, as authorized by section 15 of the Act of May 1st 1852 (S. & C. 279), if objected to, cannot be given in evidence without proof of its execution: *Walsh* v. *Burton*, 24 Ohio St.

The power to purchase land, conferred upon a railroad company by section 14 of the Act of February 11th 1848 (S. & C. 273, note), is not limited to the acquisition of such lands as may be necessary for operating or maintaining its road: *Id.*

If, in making a purchase of real estate, the company abuse the power conferred upon it by said section, still, after resale and conveyance, the title becomes indefeasible in the hands of its vendee: *Id.*

A mortgage executed by a railroad company on "the road" of the company, "whether made or to be made, acquired or to be acquired, and all property, real or personal," of the company, "whether now owned or hereafter to be acquired, used or appropriated for the operating or maintaining the said road," is not a lien upon real estate of the company, then owned or afterward acquired, which has not been used or appropriated for operating or maintaining the road: *Id.*

RECEIPT. See *Evidence.*

SPECIFIC PERFORMANCE. See *Vendor and Purchaser.*

STREET. See *Municipal Corporation.*

SURETY. See *Debtor and Creditor.*

TOWN. See *Negligence.*

TRESPASS.

Pleading—New Assignment.—In trespass *quare clausum*, when the declaration only counts upon a single act of trespass, which is justified by plea, the plaintiff cannot in his replication traverse the matter of justification, and also new assign the same or different acts of trespass: *Spencer* v. *Bemis*, 46 Vt.

UNITED STATES COURTS.

Practice—Submission of Case without a Jury—Review in such case.—The case of *Folsom* v. *Insurance Company*, 18 Wallace 237, and the numerous cases there cited, p. 244, affirmed, and the doctrine again declared, that where a jury is waived and the issues of fact submitted to the Circuit Court, under the Act of March 3d 1865 (quoted in the report of the case cited, p. 238), this court will not review the finding of the court where it is general and unaccompanied by any authorized statement of facts; and that in the case of such general finding, "nothing is open to review by the losing party under a writ of error except the rulings of the Circuit Court in the progress of the trial, and that the phrase, 'rulings of the court in the progress of the trial,' does not include the general finding of the Circuit Court nor the conclusions of the Circuit Court embodied in such general finding:" *Cooper, Executor.* v. *Omohundro*, 19 Wall.

Practice.—The doctrine of the preceding case reaffirmed. Declared further, and in explanation, that a mere report of the evidence is not such a special finding or authorized statement of the case as will allow this court to pass upon the judgment given: *Crews* v. *Brewer*, 19 Wall.

Jurisdiction—Averment of Citizenship of Parties.—When a citizen of one state as endorsee of inland bills, drawn or accepted by a citizen of another—the plaintiff claiming through the endorsement of the payee, or of the payee and subsequent endorsers—sues the drawer or acceptor, in the Circuit Court, the eleventh section of the Judiciary Act requires that the citizenship of such payee, or of such payee and subsequent endorsers, be alleged to be different from that of the defendant. It is not enough to allege that the plaintiff is a citizen of one state and the defendant of another: *Morgan's Executor* v. *Gay*, 19 Wall.

It is not competent for a Circuit Court to determine, without the intervention of a jury, an issue of fact in the absence of the counsel of the party and without any written agreement to waive a trial by jury: *Id.*

UNITED STATES LAND OFFICE. See *Ejectment; Evidence.*

VENDOR AND PURCHASER. See *Covenant.*

Statute of Frauds—Specific Performance—Encumbrance—Title.—Where the name of the agent, with whom a contract for the purchase of real estate was made, appears in the written memorandum of the agreement signed by the purchaser, who is the party to be charged, the Statute of Frauds is satisfied, although the names of the principals are not disclosed therein: *Walsh* v. *Barton et al.*, 24 Ohio St.

When a vendor of land, having contracted to convey a perfect title, brings his action to compel specific performance against the vendee, who denies the sufficiency of the vendor's title, the burden of showing title in himself rests on the plaintiff, and the introduction of a deed of recent date executed to himself, without further proof of title, is not sufficient: *Id.*

A purchaser of land, who is entitled under his contract to a perfect title, cannot be compelled to perform his agreement, if the property purchased be subject to a judgment lien, unless he can be protected by the decree from loss or inconvenience by reason of the lien, although it be shown that the judgment-debtor has other property sufficient to satisfy the judgment: *Id.*

WILL.

Election—Presumption of Intention—Equity—Husband and Wife.—Where a will assumes to give to one of its beneficiaries property of another person for whom provision is likewise made in the will, the latter cannot take the provision made for him in the will, and also hold the property, but must elect which he will take: *Huston* v. *Cone*, 24 Ohio St.

In order to put the party to such election, it must *plainly* appear that it was not the intention of the testator to give him the provision made in the will in addition to the property, except where the property in question is the widow's right of dower, as to which the rule has been reversed by statutory provision: *Id.*

A court of equity has jurisdiction to compel the party to make such election, or to abide by an election already made: *Id.*

Such election, in order to make it binding upon the party, must be made understandingly, that is, with a knowledge of the facts, and of the party's rights under the will: *Id.*

Money borrowed by the husband from the wife, and secured to her by the note of the husband, given to her at the time of receiving the money, will, after her death, and as between the husband and her estate, be regarded as an equitable claim against the husband; and, therefore, a provision in her will releasing such a claim, is a provision beneficial to the husband: *Id.*

NEW LAW BOOKS.

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